Supreme Court, U.S.
FILED

95 1045 DEC 11 1995

OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1995

WILLIAM J. MCBANE, III,

*Petitioner,*

vs.

STATE OF MISSOURI,

*Respondent.*

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Missouri

## PETITION FOR WRIT OF CERTIORARI

RONALD R. HOLLIDAY*
THOMAS, BURNS & HOLLIDAY, P.C.
Suite 302, 400 Jules
St. Joseph, Missouri 64501
(816) 279-0861

*Attorney for Petitioner*

(*Counsel of Record)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

## QUESTION PRESENTED FOR REVIEW

Whether the due process right of the accused to face trial only while capable of understanding and assisting in the proceeding is subject to waiver by the attorney for the accused.

TABLE OF CONTENTS

Page

Question Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... iv

Opinions Below ..... 1

Jurisdiction ..... 1

Constitutional Provisions ..... 1

Statement of the Case ..... 2

A. Overview and Statement of Facts ..... 2

B. Statement of Evidence Adduced ..... 3

1. Pre-trial Proceedings ..... 3

2. The Only Competency Hearing ..... 9

3. Proceedings Following the Hearing ..... 11

4. Federal Questions Sought to be Reviewed .. 15

Reasons for Granting the Writ ..... 16

I. The Judgment of the Missouri Supreme Court Conflicts with Prior Decisions of the United States Supreme Court ..... 16

The Due Process Right of the Accused to Face Trial Only While Capable of Understanding and Assisting in the Proceeding Is Not Subject to Waiver. Counsel Cannot Waive this right for the Accused ..... 16

TABLE OF CONTENTS – Continued

Page

II. The Facts of this Case Demonstrate the Need of a United States Supreme Court Decision That Describes When Trial Courts Are Obligated to Conduct an Evidentiary Hearing on the Issue of Competency ..... 20

A Trial Court Should Hold a Competency Hearing Regarding the Competency of the Accused Before Proceeding to Trial Whenever it Receives Contradictory Evidence on the Issue after a Finding in the First Competency Hearing That the Accused Was Not Competent to Proceed ..... 20

Conclusion ..... 22

# TABLE OF AUTHORITIES

Page


CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V; VI; XIV, § 1 ..... 1, 2, 15

FEDERAL CASES

*Drope v. Missouri*, 420 U.S. 162 (1975) ..... 17, 20, 21

*Dusky v. United States*, 362 U.S. 402 (1960) ..... 16

*Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991)....20, 21

*Lindhorst v. United States*, 658 F.2d 598 (8th Cir. 1981) ..... 21

*Pate v. Robinson*, 383 U.S. 375 (1966) ..... 16, 17, 20, 21

*Speedy v. Wyrick*, 702 F.2d 723 (8th Cir. 1983)..... 21

*Taylor v. United States*, 282 F.2d 16 (8th Cir. 1960) .... 17

*United States v. Day*, 949 F.2d 973 (8th Cir. 1991)....20, 21

STATE CASES

*Briggs v. State*, 509 S.W.2d 154 (Mo. Ct. App. 1974) .... 18

*Miller v. State*, 498 S.W.2d 79 (Mo. Ct. App. 1973) .... 17

*State v. Anderson*, 493 S.W.2d 681 (Mo. Ct. App. 1973) ..... 19

*State v. Lee*, 660 S.W.2d 394 (Mo. Ct. App. 1983)..... 19

*State v. Scott*, 858 S.W.2d 282 (Mo. Ct. App. 1993) ..17, 18

STATUTES

28 U.S.C. § 1257 ..... 1

Mo. Rev. Stat. § 552.020 .....19, 22

## OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District, dated July 25, 1995 is reported at 904 S.W.2d 548 (Mo. Ct. App. 1995) and is reproduced in the Appendix. (App. at 1.)

The order of the Missouri Supreme Court, dated September 19, 1995, denying transfer is not reported and is reproduced in the Appendix. (App. at 10.)

## JURISDICTION

The Judgment of the Missouri Supreme Court sought to be reviewed was entered September 19, 1995.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V:

> . . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted

> with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV § 1:

> . . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . .

## STATEMENT OF THE CASE

### A. Overview and Statement of Facts

William J. McBane, III committed the crimes of assault, kidnapping, rape, sodomy, and armed criminal action (Legal File 2-23).[1] These heinous and inexplicable crimes had no rational motive. He made no conscious effort to escape detection or avoid arrest. The victim was Mr. McBane's former mother-in-law with whom he had previously enjoyed good relations (Tr. 220). Mr. McBane assaulted the victim by raping her in her home and then kidnapping her. He drove the victim to a desolate area where he again sexually assaulted her and then stabbed her. Mr. McBane then abandoned the victim and returned home. The victim walked to a nearby farmhouse and obtained help. When a sheriff's deputy went to his home, Mr. McBane answered the door and did not conceal his

[1] The record in this case consists of a Legal File (hereinafter "L.F."), a Trial Transcript (hereinafter "Tr."), a Transcript of the pre-trial hearing on January 27, 1994 (hereinafter "Tr. of Pre-trial Hearing"), and Exhibits (hereinafter "Ex.").

identity or attempt to run. Several incriminating items of evidence, including bloody clothes, were recovered in plain view from the defendant's vehicle parked outside.

Mr. McBane, represented at trial by a public defender, pled not guilty by reason of mental disease or defect (L.F. 25). Following two pre-trial psychiatric evaluations, a hearing was held on Mr. McBane's competency to stand trial (L.F. 30; Tr. 8-72). On the basis of two psychiatric evaluations, the trial court found that Mr. McBane was *not* competent to stand trial (L.F. 30; Tr. 66). The next day the trial court entered an order for yet another examination of Mr. McBane as to his fitness to proceed (L.F. 95; Tr. 70-72). The court then set the matter for "docket call" in two months (Tr. 73).

At the docket call, the case was set for trial in two more months (L.F. 30; Tr. of Pre-Trial Hearing on January 27, 1994, p. 8). There were no further hearings on Mr. McBane's mental competency. There was no finding by the court as to Mr. McBane's competency to stand trial (L.F. 30; Tr. of Pre-Trial Hearing on January 27, 1994).

The jury trial was held on March 23 and 24, 1994 (L.F. 30-33). Mr. McBane was found guilty on all seven counts. He was sentenced to three life sentences plus sixty-five years (L.F. 33; Tr. 154-156).

## B. Statement of Evidence Adduced

### 1. Pre-trial Proceedings

Mr. McBane entered a plea of not guilty to the charges by reason of mental disease or defect excluding responsibility (L.F. 25). He was represented at trial by the

Public Defender, Timothy D. Ernst (L.F. 25). Mr. Ernst promptly filed a Motion for a Mental Examination of Mr. McBane. The court sustained that Motion (L.F. 25; 34-36; 37-38).

Bruce Harry, M.D., a Staff Psychiatrist with a state mental hospital, was the prosecution's expert (L.F. 39-55). He filed a report in which he concluded that Mr. McBane was mentally ill at the time of the crimes – and currently. He believed that Mr. McBane knew he was being prosecuted, but Mr. McBane was unable to help his attorney. He did not know if Mr. McBane's mental illness had caused the crime in a legal sense. His report stated:

*CONCLUSIONS:*

> It is the opinion of this examiner, within a reasonable degree of medical certainty, that Mr. McBane currently has a mental disease or defect and suffered from a mental disease or defect at the time of the present offense. This examiner opines within a reasonable degree of medical certainty that Mr. McBane has the mental capacity to understand the proceedings against him but is unable to assist his attorney in his own defense. This examiner is unable to give an opinion within a reasonable degree of medical certainty whether Mr. McBane, at the time of the crime, had the mental capacity to know or appreciate the nature, quality or wrongfulness of his conduct, or was capable of conforming his conduct to the requirements of the law.
>
> (L.F. 55)

Dr. Harry recommended further hospitalization. His report stated:

*RECOMMENDATIONS*

> Mr. McBane requires hospitalization pending determination by the court of the issue of mental fitness to proceed. Additionally, he requires treatment for his Severe, Recurrent, Major Depression with Psychotic Features. This treatment is anticipated to consist of both antidepressant and possibly antipsychotic medications along with supportive psychotherapy. Further, Mr. McBane should be watched very carefully for suicide. It is anticipated that treatment for this condition will take at least two to four months, but possibly longer. Additionally, this examiner believes Mr. McBane requires hospitalization pending further proceedings because of Mr. McBane's very high suicide risk and *severe mental illness.* (emphasis added)
>
> (L.F. 55)

Based on this report from Dr. Harry, Mr. McBane's trial counsel filed a "Motion for a Definite Ruling on Defendant's Mental Capacity at the Time of the Alleged Offenses, or, in the Alternative, a Second Mental Examination" (L.F. 25; 56-57).

The trial court ordered the Department of Mental Health to examine Mr. McBane and to report its opinion (L.F. 26; 58-59).

The certified report filed in response was also prepared by Dr. Harry (L.F. 27; 60-74). Dr. Harry again stated that Mr. McBane was very sick.

> "The undersigned opines to a reasonable degree of medical certainty that Mr. McBane should be detained in a suitable hospital facility

pending further proceedings should he be found mentally fit to proceed for the following reasons:

> "1. Mr. McBane has been severely mentally ill and suicidal and is at risk for relapse should he be placed in a highly stressful environment such as a county jail or holding facility. His medication needs to be carefully monitored and it should be necessary to make certain that he is obtaining the medication as prescribed, otherwise he will suffer a relapse that could possibly result in postponing proceedings again."

(L.F. 73-74)

Dr. Harry concluded that Mr. McBane would not have committed the crimes but for the illness, but he concluded that Mr. McBane could now assist his attorney and that Mr. McBane did know what he was doing when he committed the crimes. His report stated:

> *CONCLUSIONS*:
>
> It is the opinion of this examiner to a reasonable degree of medical certainty that Mr. McBane currently has a mental disease or defect and suffered from the mental disease or defect at the time of the present offense. This examiner opines to a reasonable degree of medical certainty that Mr. McBane now has the mental capacity to understand the proceedings against him and is capable of assisting his attorney in his own defense. This examiner believes that Mr. McBane probably would not have been involved in the present offenses had he not been severely mentally ill at that time. However, careful analysis of the offense and Mr. McBane's behavior

> and statements noted during the offense leads this examiner to opine to a reasonable degree of medical certainty that Mr. McBane at the time of the crime, had the mental capacity to know or appreciate the nature, quality, or wrongfulness of his conduct, and was capable of conforming his conduct to the requirements of the law. The examiner recommends that Mr. McBane remain hospitalized pending further proceedings to continue to receive treatment for his severe mental disease and to watch him for suicide.
>
> (L.F. 74)

Mr. McBane's trial counsel promptly filed a "Motion for Second Mental Examination" (L.F. 27; 75-76). The trial court ordered a second mental examination, to be performed by Dr. Steven Mandracchia of Kansas City, Missouri (L.F. 27; 78-79).

Steven A. Mandracchia concluded that Mr. McBane could not assist his attorney and that Mr. McBane was substantially impaired by mental illness when the crimes were committed. His report stated as follows:

*RESPONSE TO COURT ORDERED ITEMS:*

As requested by the Court Order, the following is offered:

1. In the opinion of the examiner the accused, as a result of mental disease or defect, lacks capacity to assist in his own defense.

2. It is recommended that the accused continue to be held in a suitable hospital facility for treatment pending determination by the Court of the issue of mental fitness to proceed.

3. It is recommended that the accused, if found by the Court mentally fit to proceed, continue to be detained in such hospital facility pending further proceedings.

4. Detailed findings are presented above.

5. In the opinion of the examiner the accused suffers from mental disease or defect in the form of Major Depression, Recurrent, with Mood-Congruent Psychotic Features (DSM-III Code 296.34); Rule Out Bipolar Disorder, Depressed (DSM-III Code 296.54).

6. In the opinion of the examiner, at the time of the alleged criminal offenses the accused was suffering from mental disease or defect, specifically Major Depression with Psychotic Features, which substantially impaired his capacity to know and appreciate the nature, quality or wrongfulness of his actions, and which rendered him incapable of conforming his conduct to the requirements of the law.

(L.F. 90)

Soon after the trial court set the case for trial in December of 1993 (L.F. 29). Mr. McBane's trial counsel formally notified the court of his intent to continue with Mr. McBane's plea of not guilty by reason of mental disease or defect excluding responsibility (L.F. 29; 91-92).

The next month, Mr. McBane's trial counsel moved for a hearing to determine competency to stand trial on the basis that the matter of his competency to stand trial was contested (L.F. 29; 93-94).

## 2. The Only Competency Hearing

A hearing was held concerning Mr. McBane's competency to stand trial in November of 1993 (L.F. 30; Tr. 8-65).

Dr. Bruce Harry, a staff psychiatrist at Fulton State Hospital and an Associate Professor of Psychiatry at the University of Missouri – Columbia School of Medicine, was called by the prosecution (Tr. 10). Dr. Harry first saw Mr. McBane in September of 1992. He had conducted the first mental examination ordered by the Court (Tr. 11). He reviewed copies of all documents provided by the prosecutor's office, St. Joseph Hospital, Menorah Hospital, and Fulton State Hospital (Tr. 11-12). Dr. Harry then held an opinion to a reasonable degree of medical certainty that Mr. McBane had a mental disease or defect at that time and although he had the mental capacity to understand the proceedings against him, he was *unable* to assist in his own defense (Tr. 12). Dr. Harry had then recommended a course of treatment including the use of antidepressant medication. Mr. McBane was treated with a "new" medication called "sertraline" (Tr. 13).

Between September of 1992 and March of 1993, Dr. Harry observed Mr. McBane's overall clinical condition improve (Tr. 13-14). He had spent approximately only two hours with Mr. McBane in that period (Tr. 14). The last time he had sat down and talked with Mr. McBane was January 14, 1993 (Tr. 16).

Dr. Harry testified that Mr. McBane was capable of only minimal, if any, social interactions (Tr. 17); that he

was withdrawn, in distress, showed psychomotor slowing (Tr. 18); that he had a "flat" or non-expressive expression; that he felt considerable confusion (Tr. 19); that he had a mental disease or defect with a diagnosis of severe major depression with psychotic features (Tr. 20). Dr. Harry confirmed that Mr. McBane was markedly depressed, withdrawn, and preoccupied (Tr. 21); and that he showed mild impairment in his ability to concentrate (Tr. 23). Dr. Harry had recommended in an addendum to his original report (March 22, 1993) that Mr. McBane "be detained in a suitable hospital facility pending further proceedings in this case," stating that "he has been severely mentally ill and suicidal and is at risk for relapse should he be placed in a highly stressful environment such as a county jail or a holding facility" (Tr. 27-28). Mr. McBane had been off medications since August of 1993 due to a suicide attempt (Tr. 29-30). Mr. McBane was not being treated with medication.

Dr. Harry admitted in direct questioning that he did not know if Mr. McBane was competent to proceed to trial (Tr. 35).

Dr. Mandracchia, a licensed psychologist and a certified forensic examiner, was called by Mr. McBane (Tr. 38). Dr Mandracchia is a member of the Board that certifies forensic examiners in Missouri (Tr. 39). Dr. Mandracchia is Director of the Department of Forensics Psychiatry at Western Missouri Mental Health in Kansas City. He had done between 130 and 160 mental exams a year for the past 11 years (Tr. 39).

Dr. Mandracchia had conducted a mental examination of Mr. McBane in August of 1993 (Tr. 40). He had

concluded that Mr. McBane was not competent to stand trial (Tr. 41). He stated that it was pretty evident that "there has been decompensation or a relapse" of Mr. McBane, meaning a return of the mental illness and its symptomology (Tr. 42). Mr. McBane was not being treated with medication.

The trial court then took the matter "under advisement."

The next day the court found Mr. McBane *not* competent to proceed to trial (Tr. 66).

### 3. Proceedings Following the Hearing

Following its determination that Mr. McBane was not competent to proceed, the court stated:

> What I am going to do is if the State talks to the doctors down there and if you have some information that they say that he is competent and they're willing to come up to testify that he is, then I will be glad to re-open the motion and hearing and hear that additional evidence to have a basis to find him competent . . .
>
> (Tr. 67)

The prosecutor then stated to the court that he had already talked to officials at Fulton State Hospital (Tr. 67). The prosecutor stated in part:

> . . . Dr. Peters told – informed me that there was no reason, as far as Fulton was concerned, for either himself or Dr. Duong or any other person to perform the exam as to competency because

there were two other mental exams already conducted . . .

(Tr. 68)

THE COURT: And that was my intention, what I was finishing before you stopped me. My feeling was 1.) to give you the option of talking to them, and that's where you said you have talked to them. And if you felt after talking to them you wanted to present any additional evidence to supplement what Dr. Harry said, which would bring it up to today, which is what I feel like I need to have based on the evidence presented yesterday which shows changes in his behavior since January, I would allow you to do that. Just make a motion, notice it up, put on the additional evidence and I can determine that.

The other option that I intend to do is, absent you doing that or you don't feel there is something there for you to present in addition, I am going to order the Fulton State Hospital to examine the defendant for his competency to proceed and to give me a report on that within 60 days of that date.

So that's two options: 1.) You can pursue it on your own. And if you talk to doctors and they have done this determination already in their treatment of the defendant and you want to do that, set it up through my clerk and notice it up for a hearing and we'll hear that additional evidence. If you don't, then I am going to enter an order today ordering them to do it and we ought to get a report within 60 days and then we can all decide what we can do from there.

(Tr. 69-70)

THE COURT: All right. *And the statute talks about six months, but I am not going to wait six months. If he is competent to proceed, let's go ahead and get this thing going. If he's not competent to proceed, then we're going to be faced with that situation; either it's going to be they've found additional evidence or we're going to have to wait until he is treated* . . . (emphasis added).

(Tr. 70-71)

The next day, the court entered an "Order for Examination on Mental Fitness to Proceed" (L.F. 95).

Yet another report of a mental exam of Mr. McBane was prepared by yet other doctors. The report authored by Richard N. Gowdy and J.C. Peters of the Biggs Forensic Unit was filed with the court records on December 19, 1993 (L.F. 30). The report was prepared on the basis of only their review of reports from Dr. Harry and a 45 minute interview with Mr. McBane (L.F. 96). Unaccountably, the authors did not review the report by Dr. Steven Mandracchia (L.F. 98). The findings of this report were as follows:

"*FINDINGS*:

"1. The accused does suffer from a mental disease, major depression, is now in partial remission, according to Chapter 552, RSMo.

"2. The defendant has the capacity to understand the proceedings against him and the nature of the judicial process and would be able to assist his attorney in his defense.

"3. It is recommended that the defendant be psychiatrically hospitalized for treatment pending the court's determination of the issue of

> mental fitness to proceed until discharged by his treating physician.
>
> "4. It is recommended that the defendant, if found by the court to be mentally fit to proceed, be psychiatrically hospitalized pending further proceedings until discharged by his treating physician."
>
> (L.F. 101)

The trial court did not conduct a hearing on Mr. McBane's competency to proceed after it received this written report (Tr. 70-91). The trial court never found Mr. McBane competent to proceed to trial. The authors never testified. Mr. McBane never had an opportunity to challenge their methods, credentials, or conclusions (L.F. 30). Instead, the court simply set the case for trial (L.F. 30; Tr. of Pre-Trial Hearing on January 27, 1994, p. 1-8).

Mr. McBane was tried in March of 1994. He was found guilty as to all counts.

The Missouri Court of Appeals affirmed the conviction ruling that Mr. McBane's trial counsel made no objection to the procedure adopted by the trial court and that the "rights available under § 552.020 (The Missouri statute on procedures pertaining to mental competency examinations) are personal to the accused who may waive them" (App. at 6). The Missouri Court of Appeals also ruled that the trial court did not err by failing to hold *sua sponte* a second competency hearing after initially finding Mr. McBane not competent to proceed after the first competency hearing since his trial counsel made no objection to the procedure (App. at 6). The Missouri

Supreme Court thereafter entered its order refusing to accept transfer of the case (App. at 10).

### 5. Federal Questions Sought to be Reviewed

The questions presented by this case are rooted in the Constitution of the United States. The Petitioner, Mr. McBane, is now insane, probably committed these terrible and irrational crimes because he was then insane, and was so impaired at the time of trial that he could not effectively help his trial lawyer. Under these circumstances, he was denied Due Process as it is guaranteed to him in the federal Constitution. *U.S. Const. amend.* V; XIV § 1. If he could not communicate well with his attorney, he was denied adequate Assistance of Counsel as it is guaranteed to him in that Constitution. *U.S. Const. amend.* VI. If he did not appreciate the nature of his prosecution because of his mental illness, he was denied his right to be Informed of the Nature and Cause of the Accusation as it is guaranteed in the Constitution of the United States. *U.S. Const. amend.* VI. Mr. McBane sought to assert these rights in the state circuit court by timely motions and objections. He raised these issues in the Missouri Court of Appeals and the Supreme Court of Missouri. The state appellate court decided the appeal holding that the right to be tried only when competent may be waived by counsel and that it was so waived in this case by Mr. McBane's public defender.

## REASONS FOR GRANTING THE WRIT

In this case, the Missouri state courts have decided that, one, the due process right of the accused to face trial only while capable of understanding and assisting in the proceeding is subject to waiver by the accused's attorney, and two, trial courts are not obligated to conduct a second evidentiary hearing on the issue of competency to proceed even when faced with conflicting evidence unless counsel explicitly requests it. The first point conflicts with this court's holdings on the nature of due process. The second point has not been previously addressed by this court.

### I. The Judgment of the Missouri Supreme Court Conflicts with Prior Decisions of the United States Supreme Court.

**The Due Process Right of the Accused to Face Trial Only While Capable of Understanding and Assisting in the Proceeding Is Not Subject to Waiver. Counsel Cannot Waive this Right for the Accused.**

This Court has established that fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial. *Pate v. Robinson*, 383 U.S. 375 (1966); and *Dusky v. United States*, 362 U.S. 402. In *Pate* this Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives the defendant of the right to a fair trial. In *Dusky* this Court held that to determine whether a defendant is competent to stand trial, " . . . the 'test

must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.' " In *Drope v. Missouri*, 420 U.S. 162 (1975), this court held that due process requires that a trial court conduct a competency hearing, either upon a motion or *sua sponte*, whenever there is sufficient doubt about the defendant's competence.

The question of competency to stand trial is an issue that a defendant cannot waive by going to trial, for the law assumes that a mentally incompetent person lacks the capacity to understand a right. One cannot give up what one does not understand. *Pate*, 383 U.S. at 384; and *Taylor v. United States*, 282 F.2d 16, 23 (8th Cir. 1960). "It is contradictory to argue that a defendant may be incompetent and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate*, 383 U.S. at 384. The due process right of the accused to face trial only while capable of understanding and assisting in the proceeding is not subject to waiver. It follows that counsel could not waive it for him. Missouri courts have previously acknowledged this. *Miller v. State*, 498 S.W.2d 79 (Mo. Ct. App. 1973).

The Court of Appeals found that Mr. McBane's trial counsel expressly concurred in the appropriateness of the trial court's proposed procedures. It cited *State v. Scott*, 858 S.W.2d 282, 285 (Mo. Ct. App. 1993) in support of its contention that "as opposed to a simple failure to object, which may warrant plain error review, here there was an affirmative waiver of an allegation of error, and thus the

matter will not be considered under the plain error doctrine" (App. at 6). The Court of Appeals materially erred in a matter of law in this finding. In *Scott* the defendant's lawyer responded "No objection" to the offer of the introduction of a knife into evidence at trial. On appeal, the defendant complained of the introduction of the knife into evidence. A knife is not due process. An accused commits the questions of objections to evidence to his or her attorney, but not the power to waive the right not to be tried while not mentally competent.

That court had stated in *Briggs v. State*, 509 S.W.2d 154 at 156 (Mo. Ct. App. 1974),

> When the State initiates criminal charges against an accused, the accused and the State are immediately pitted against each other in the most grave adversary proceeding existent in our system of justice. Problems necessarily inherent in this most grave of adversary proceedings are legion. Nowhere, perhaps, is there encountered an area so fraught with basic procedural problems as those arising where an accused lacks the requisite mental capacity to knowingly and meaningfully understand the import of the charges levelled against him and to viably consult with counsel and assist in his own defense. By dictate of the American conscience, long steeped in hallowed traditions of basic fair play and justice, judicial and statutory safeguards have been created to balance the adversary proceeding where it appears that an accused is suffering from a mental disease or defect. Chapter 552, RSMo., 1969, VAMS, represents Missouri's statutory response to this dictate of conscience.

A section of that cited statute is included in the Appendix at page 11.

Another stated basis for the Court of Appeals' ruling was that "the rights available under § 552.020 are personal to the accused who may waive them" (App. at 6). Citing *State v. Lee*, 660 S.W.2d 394 (Mo. Ct. App. 1983), the Court of Appeals again materially erred on a matter of law. In *Lee* the defendant had one mental exam which revealed that the defendant was competent. However, the report was not filed by the date of trial. On appeal the defendant complained that he was prejudiced because he could not contest the report. The court held, at p. 398, that "the rights available under Section 552.020 are personal to the accused who may waive them." *However*, in the very next sentence of the opinion, the court completed its thought thusly, *"obviously, such a waiver may be established by the informed personal express waiver of the accused." State v. Anderson*, 493 S.W.2d 681, 684 (Mo. Ct. App. 1973).

There was no "informed personal express waiver by the defendant." (Mr. McBane was not even present in the courtroom when his trial counsel agreed to set the case for trial.)

## II. The Facts of this Case Demonstrate the Need of a United States Supreme Court Decision That Describes When Trial Courts Are Obligated to Conduct an Evidentiary Hearing *Sua Sponte* on the Issue of Competency.

### A Trial Court Should Hold a Competency Hearing Regarding the Competency of the Accused Before Proceeding to Trial, after Finding in the First Competency Hearing That the Accused Was Not Competent to Proceed, Whenever it Receives Contradictory Evidence on This Issue.

This Court in *Pate*, 383 U.S. at 375, held that a trial court must hold a competency hearing *sua sponte* where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. The right to a hearing on the issue of competency rises to a level of a constitutional guarantee where the record contains "sufficient indicia of incompetence," such that an inquiry into the defendant's competency is necessary to ensure the defendant's right to a fair trial. Those are the facts established in the record in this case. *Pate* is applicable. A hearing was necessary in this case. None was held. The trial was unfair. See *Drope*, 420 U.S. 162. (The Eighth Circuit has used the words "sufficient doubt." See *United States v. Day*, 949 F.2d 973, 981 (8th Cir. 1991). See also *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991) where, in a footnote, that court addressed the evolution of the "bona fide doubt" phrase first used by this Court in *Pate*.)

In order to mount a successful due process challenge, the accused must make "a showing that the trial judge failed to see the need for a competency hearing when, based on the facts and circumstances known to him at the

time, he should have seen such a need." *Day*, 949 F.2d at 982. A medical opinion on the mental competency of an accused is usually persuasive evidence on the question of whether a sufficient doubt exists. *Griffin*, 935 F.2d at 930; *Lindhorst v. United States*, 658 F.2d 598, 607-08 (8th Cir. 1981).

A judge's failure to perform this duty violates the defendant's "due process right to a fair trial." *Drope*, 420 U.S. at 172. In this context, a hearing requires the presence of the defendant and his counsel, the opportunity to be heard, to offer evidence, and to test the evidence.

The issue framed by *Pate* and *Drope* is not whether the defendant was competent to stand trial, but whether the absence of a hearing on the question of his competency amounted, in the circumstances of the case, to a denial of due process. *Drope*, 420 U.S. at 172; *Pate* 383 U.S. at 385; *Griffin*, 935 F.2d at 926.

The Court's opinion in *Speedy v. Wyrick*, 702 F.2d 723 (8th Cir. 1983), contains a useful discussion about the evidence necessary for this showing:

> " . . . an evidentiary hearing as to the defendant's competency is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial . . . evidence is 'substantial' if it raises a sufficient doubt about the defendant's competency to stand trial." *Id.* at 725.

In the case at bar, the evidence showed far more than a "bona fide doubt" as to Mr. McBane's competence to stand trial. Indeed, based on testimony received at a full competency hearing from two experts, the trial court

*found* that Mr. McBane was not competent to stand trial. There were two court ordered mental examinations, a full hearing on competency, and a finding by the trial court that Mr. McBane was not competent to proceed. Therefore, the trial court should have suspended the proceedings and committed Mr. McBane to the Missouri Department of Mental Health. (See § 552.020.8, RSMo., App. at 12.) Mr. McBane needed treatment. A fair reading of the Missouri statute indicates that the six month period mentioned in § 552.020.10 is for the purpose of the accused receiving treatment for his illness. Nevertheless, at the *very* least, the trial court should have conducted a second competency hearing *sua sponte* before proceeding to trial.

## CONCLUSION

The major value of the competency doctrine has been to maintain the fairness of the criminal trial process. The adversarial trial system requires that the accused must have a fair opportunity to mount any reasonable, available defenses against charges brought by the state. This opportunity is threatened when mental incapacity seriously reduces the defendant's ability to meet the demands of this role in the trial. Proceeding to trial under these circumstances threatens the fairness of our criminal trial process.

Mr. McBane respectfully suggests that the Petition for Writ of Certiorari should be granted to review the judgment below and to decide the important questions of due process which this case squarely presents to the Court.

Respectfully submitted,

RONALD R. HOLLIDAY*
THOMAS, BURNS & HOLLIDAY, P.C.
Suite 302, 400 Jules
St. Joseph, Missouri 64501
(816) 279-0861

*Attorney for Mr. McBane*

(* Counsel of Record)

**IN THE**
**MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| STATE OF MISSOURI, Respondent, -vs- WILLIAM J. McBANE, III, Appellant. | ) | WD 49403<br>Opinion filed<br>July 25, 1995 |

**APPEAL FROM THE CIRCUIT COURT**
**OF BUCHANAN COUNTY**
**The Honorable Patrick K. Robb, Judge**

Before Fenner, C.J.; Breckenridge and Hanna, JJ.

William J. McBane, III, appeals from convictions of assault in the first degree, § 565.050, RSMo 1994; kidnapping, § 565.110, RSMo 1994; rape, § 566.030, RSMo Cum. Supp. 1992; sodomy, § 566.060, RSMo Cum. Supp. 1993; and three counts of armed criminal action, § 571.015, RSMo 1994. He now appeals claiming that the trial court erred by failing to follow the statutory procedure for determining his competence to stand trial, and by failing to *sua sponte* conduct a second competency hearing.

The judgment of the trial court is affirmed.

After being charged with the above offenses, which stemmed from a brutal attack on his former mother-in-law, Mr. McBane filed notice of his intent to rely on the defense of nonresponsibility as a result of mental disease or defect. Accordingly, Mr. McBane asked the trial court to order a mental examination pursuant to § 552.020.4,

RSMo 1986.[1] In granting the motion, the trial court concluded that there was reasonable cause to believe that Mr. McBane was not mentally fit to proceed with the case. The trial court ordered the mental examination to include an opinion as to whether Mr. McBane had the capacity to understand the proceedings against him or to assist in his own defense, and as to whether, at the time of the offense, Mr. McBane knew or appreciated the nature, quality, or wrongfulness of his conduct, or was capable of conforming his conduct to the requirements of the law.

A mental examination was performed by Dr. Bruce Harry, staff psychiatrist at the Fulton State Hospital. In his September 25, 1992 report, Dr. Harry concluded that

> Mr. McBane currently has a mental disease or defect and suffered from a mental disease or defect at the time of the present offense. . . . Mr. McBane has the mental capacity to understand the proceedings against him but is unable to assist his attorney in his own defense. This examiner is unable to give an opinion within a reasonable degree of medical certainty whether Mr. McBane, at the time of the crime, had the mental capacity to know or appreciate the nature, quality, or wrongfulness of his conduct, or was capable of conforming his conduct to the requirements of the law.

Following this incomplete evaluation, Mr. McBane filed a motion seeking a more definite determination of his mental capacity at the time of the charged offenses, or in the alternative, a second mental examination. In a

---

[1] All references to § 552.020 are to Revised Missouri Statutes 1986, unless otherwise indicated.

follow-up report dated March 22, 1993, Dr. Harry made the following conclusions:

> It is the opinion of this examiner to a reasonable degree of medical certainty that Mr. McBane currently has a mental disease or defect and suffered from the mental disease or defect at the time of the present offense. This examiner opines to a reasonable degree of medical certainty that Mr. McBane now has the mental capacity to understand the proceedings against him and is capable of assisting his attorney in his own defense. This examiner believes that Mr. McBane probably would not have been involved in the present offenses had he not been severely mentally ill at that time. However, careful analysis of the offense leads this examiner to opine to a reasonable degree of medical certainty that Mr. McBane at the time of the crime, had the mental capacity to know or appreciate the nature, quality, or wrongfulness of his conduct, and was capable of conforming his conduct to the requirements of the law.

In his report, Dr. Harry indicated that his changed opinion regarding Mr. McBane's competence to stand trial was attributable to an improvement after treatment, in Mr. McBane's clinical condition since the time of Dr. Harry's earlier evaluation.

Mr. McBane then filed a motion for a second mental examination, which was granted by the trial court. In a report dated September 28, 1993, Stephen A. Mandracchia, Ph.D., made the following conclusions about Mr. McBane's mental condition:

> In the opinion of the examiner the accused, as a result of mental disease or defect, lacks capacity to assist in his own defense.
>
> . . .
>
> In the opinion of the examiner, at the time of the alleged criminal offenses the accused was suffering from mental disease or defect, specifically Major Depression with Psychotic Features, which substantially impaired his capacity to know and appreciate the nature, quality or wrongfulness of his actions, and which rendered him incapable of conforming his conduct to the requirements of the law.

In light of the conflicting reports filed by Dr. Harry and Dr. Mandracchia, Mr. McBane filed a motion for a hearing to resolve the issue of his competence to stand trial. Both Dr. Harry and Dr. Mandracchia testified at the hearing, which was held on November 22, 1993. Dr. Harry stated that, because he had not examined Mr. McBane since the follow-up evaluation, he did not have an opinion about Mr. McBane's current capacity to proceed with the trial. As a result of Dr. Harry's lack of an opinion about Mr. McBane's current capacity, and because Dr. Mandracchia's opinion was the more recent of the two, the trial court concluded that Mr. McBane was not, at that time, competent to stand trial.

However, in communicating this decision to the parties at the close of the hearing, the trial court also indicated that it was going to order the Fulton State Hospital to examine Mr. McBane once more for the sole purpose of determining his competence to proceed, and to provide a report of the examination within sixty days. There was no

objection to the trial court's plan; on the contrary, the following dialogue ensued:

> [DEFENSE COUNSEL]: Judge, I think really at this point the best thing to do would probably be to have another exam ordered strictly as to competency.
>
> [THE COURT]: All right. And the statute talks about six months, but I am not going to wait six months. If he is competent to proceed, let's go ahead and get this thing going. If he's not competent to proceed, then we're going to be faced with that situation; either it's going to be they've found additional evidence or we're going to have to wait until he is treated.
>
> . . .
>
> And until I am comfortable and until I have heard from the doctors to testify that he is competent to proceed to trial, then I am not going to order the case set for trial.
>
> [DEFENSE COUNSEL]: I think 60 days should be sufficient since we're only asking for just this one determination and not a full exam.

At the direction of the trial court, the Fulton State Hospital proceeded with another mental examination of Mr. McBane. In a report dated December 19, 1993, Richard N. Gowdy, Ph.D., and J.C. Peters, D.O., offered the following conclusions:

> The accused does suffer from a mental disease, Major Depression, which is now in partial remission, according to Chapter 552 RSMo.
>
> The defendant has the capacity to understand the proceedings against him and the nature of

> the judicial process and would be able to assist his attorney in his defense.
>
> It is recommended that the defendant be psychiatrically hospitalized for treatment pending the court's determination of the issue of mental fitness to proceed until discharged by his treating physician.

At a pre-trial hearing on January 27, 1994, the trial court informed the parties that it had received the December 19, 1993, report finding Mr. McBane competent to proceed. The trial court further informed the parties that, based upon the report, it was going to proceed and set the matter for trial. The relevant portion of the hearing transcript is quoted below:

> THE COURT: State of Missouri versus William J. McBane. Mr. McBane is not present. He is still in the Fulton State Hospital.
>
> I have received recently an evaluation. I assume both attorneys have received a copy of that; is that correct?
>
> [PROSECUTOR]: I have.
>
> [DEFENSE COUNSEL]: Judge, my office has it. My secretary read the pertinent parts to me over the phone. I have not had a chance to read it. I understand they are finding him competent to proceed.
>
> THE COURT: Yes. So at this time the Court is going to proceed and set the matter for trial. Is there anything we need to take up before we set the matter for trial?
>
> [PROSECUTOR]: I have nothing, your Honor.

> [DEFENSE COUNSEL]: I have nothing Judge. Are we intending to set this for February or go to March?

The trial took place on March 23-24, 1994, and Mr. McBane was convicted on all counts. He was sentenced to a total of three life sentences plus sixty-five years in the Missouri Department of Corrections.

In his first point on appeal, Mr. McBane claims that the trial court erred by failing to follow the relevant statutory procedure following the November 22, 1993 hearing in which the trial court found that Mr. McBane was not competent to stand trial. Specifically, Mr. McBane contends that the trial court violated the procedural requirements imposed by § 552.020.8, .9, .10 by failing to immediately suspend the criminal proceedings, by ordering a new mental examination, by failing to commit Mr. McBane to the Department of Mental Health, by setting the case for trial, and by failing to allow six months to elapse prior to ordering a new mental examination.

Mr. McBane, however, made no objection to the trial court about the procedure it adopted in the case at bar, and allegations of error will not be considered on appeal unless they were raised at the trial court level. ***State v. Blakeburn*, 859 S.W.2d 170, 176 (Mo. App. 1993).** Not only was no objection made to the procedure adopted by the trial court, Mr. McBane's counsel expressly concurred in the appropriateness of the proposed course of action. As opposed to a simple failure to object, which may warrant plain error review, here there was an affirmative waiver of an allegation of error, and thus the matter will not be considered under the plain error doctrine. ***See State v. Scott*, 858 S.W.2d 282, 285 (Mo. App. 1993).**

"[T]he rights available under § 552.020 are personal to the accused who may waive them." ***State v. Lee*, 660 S.W.2d 394, 398 (Mo. App. 1983)** (quoting ***Anderson v. State*, 493 S.W.2d 681, 684 (Mo. App. 1973)**). Mr. McBane's first point is denied.

In his second point on appeal, Mr. McBane claims that the trial court erred by failing to *sua sponte* hold another competency hearing after receiving the December 19, 1993 report prepared by Dr. Gowdy and Dr. Peters. Mr. McBane argues that the report's conclusion that he "has the capacity to understand the proceedings against him . . . and to assist his attorney" is irreconcilable with the conclusion that he "does suffer from a mental disease," and with the recommendation that he "be psychiatrically hospitalized for treatment pending the court's determination of the issue of mental fitness to proceed." Mr. McBane argues that these irreconcilable conclusions, standing alone, raise sufficient doubt as to his fitness to proceed to obligate the court to *sua sponte* conduct such a hearing.

Mr. McBane cites ***Briggs v. State*, 509 S.W.2d 154 (Mo. App. 1974)**, in support of his contention. In *Briggs*, this court held that, under the sparse facts in that case, where the report of a mental examination stated that the accused " '*has* a mental disease and defect within the meaning of Section 552.010, which existed at the time of the alleged offense,' that he '*requires psychiatric hospitalization pending further proceedings*,' and that 'he has the capacity to understand the proceedings against him and assist in his own defense,' " such conclusions were irreconcilable with one another and, standing alone, cast enough doubt about the accused's fitness to proceed that

a trial court's failure to conduct a competency hearing constituted an abuse of discretion. ***Id.*** **at 157.**

As this Court noted in ***State v. Ashley,*** **616 S.W.2d 556, 559 (Mo. App. 1981),** there is no firm rule in Missouri case law as to when a trial court must *sua sponte* hold a competency hearing, and the result in each case is dependent upon the particular facts in that case. The facts in ***Briggs*** are markedly different from those in the case at bar. In ***Briggs,*** this Court was faced with a record which was described in the opinion as "anemic at best." ***Briggs,*** **509 S.W.2d at 155.** The only information in the entire record on the defendant's mental state was the one report which contained the findings quoted above. Under these circumstances, it is evident that this Court found the "irreconcilability" of the findings to be troubling because of a total lack of any other clinical information in the record which would place those findings in any kind of explanatory context. ***Id.*** **at 157.**

Such is not the case here. In addition to the December 19, 1992 report of which Mr. McBane now complains, there are the reports of two prior mental examinations in the record, as well as a transcript of a full evidentiary hearing on the subject of Mr. McBane's competence to proceed with trial. (Mr. McBane is complaining that there wasn't a *second* competency hearing.) In the context of all of the information that was before the trial court, any "inconsistency" in the December 19, 1993 report, which found a defendant with a mental disease to be competent to stand trial while at the same time requiring further hospitalization, is explainable by the fact of an ongoing treatment program for his condition, which was in partial remission.

Unlike ***Briggs,*** in which the trial court failed to follow up on questions raised because the findings had no harmonizing explanation in the record, the findings in the case at bar occurred in the context of a thorough and conscientious search for the truth about Mr. McBane's condition. In fact, the trial court even cautioned Mr. McBane's counsel to file a motion to put on additional evidence if he had any disagreements with the December 19, 1993 report. Mr. McBane's counsel raised no such disagreement; instead, he expressly concurred in the trial court's decision to proceed with trial. Mr. McBane's second point is denied.

The judgment of the trial court is affirmed.

---

Patricia Breckenridge, Judge

All concur.

---

**In the Supreme Court of Missouri**

No. 78324
W.D. No. 49403

September Session, 1995

State of Missouri, Respondent,

vs. (TRANSFER)

William J. McBane, III, Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1995, and on the 19th day of September, 1995, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 19th day of September, 1995.

/s/ Thomas F Simon Clerk

_____ D.C.

**552.020. Lack of mental capacity bar to trial or conviction – psychiatric examination, when, report of – commitment to hospital, when – statements of accused inadmissible, when**

1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632,005, RSMo, or physicians with a minimum one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. The order shall direct that a written report or reports of such examination be filed with the clerk of the court. No private physician, psychiatrist, or psychologist shall be appointed by the court unless he has consented to act. The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that, if

the order directs the director of the department to have the accused examined, the director, or his designee, shall determine the time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses. The department shall establish standards and provide training for those individuals performing examinations pursuant to this section and section 552.030. No individual who is employed by or contracts with the department shall be designated to perform an examination pursuant to this chapter unless the individual meets the qualifications so established by the department. Any examination performed pursuant to this subsection shall be completed and filed with the court within sixty days of the order unless the court for good cause orders otherwise. Nothing in this section or section 552.030 shall be construed to permit psychologists to engage in any activity not authorized by chapter 337, RSMo.

3. A report of the examination made under this section shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect;

(3) An opinion based upon a reasonable degree of medical or psychological certainty as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment

pending determination, by the court, of mental fitness to proceed; and

(5) A recommendation as to whether the accused, if found by the court to be mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. If the accused has pleaded lack of responsibility due to mental disease or defect or has given the written notice provided in subsection 2 of section 552.030, the court shall order the report of the examination conducted pursuant to this section to include, in addition to the information required in subsection 3 of this section, an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law.

5. If the report contains the recommendation that the accused should be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within ten days after the filing of the report, both the defendant and the state shall,

upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subsection shall be completed and a report filed with the court within sixty days unless the court, for good cause, orders otherwise. A copy shall be furnished the opposing party.

7. If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subsections 2 and 3 of this section, the court may make a determination and finding on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.

8. If the court determines that the accused lacks mental fitness to proceed, the criminal proceedings shall be suspended and the court shall commit him to the director of the department of mental health.

9. Any person committed pursuant to subsection 8 of this section shall be entitled to the writ of habeas corpus upon proper petition to the court that committed him. The issue of the mental fitness to proceed after

commitment under subsection 8 of this section may also be raised by a motion filed by the director of the department of mental health or by the state, alleging the mental fitness of the accused to proceed. A report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed.

10. The following provisions shall apply after a commitment as provided in this section:

(1) Six months after such commitment, the court which ordered the accused committed shall order an examination by the head of the facility in which the accused is committed, or a qualified designee, to ascertain whether the accused is mentally fit to proceed and if not, whether there is a substantial probability that the accused will attain the mental fitness to proceed to trial in the foreseeable future. The order shall direct that written report or reports of the examination be filed with the clerk of the court within thirty days and the clerk shall deliver copies to the prosecuting attorney or circuit attorney and to the accused or his counsel. The report required by this subsection shall conform to the requirements under subsection 3 of this section with the additional requirement that it include an opinion, if the accused lacks mental fitness

to proceed, as to whether there is a substantial probability that the accused will attain the mental fitness to proceed in the foreseeable future.

(2) Within ten days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a psychiatrist or psychologist, as defined in section 632.005, RSMo, or a physician with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, of their own choosing and at their own expense. An examination performed pursuant to this subdivision shall be completed and filed with the court within thirty days unless the court, for good cause, orders otherwise. A copy shall be furnished to the opposing party.

(3) If neither the state nor the accused nor his counsel requests a second examination relative to fitness to proceed or contests the findings of the report referred to in subdivision (1) of this subsection, the court may make a determination and finding on the basis of the report filed, or may hold a hearing on its own motion. If any such opinion is contested, the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the examiner who rendered

such opinion and to offer evidence upon the issue.

(4) If the accused is found mentally fit to proceed, the criminal proceedings shall be resumed.

(5) If it is found that the accused lacks mental fitness to proceed but there is a substantial probability the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall continue such commitment for a period not longer than six months, after which the court shall reinstitute the proceedings required under subdivision (1) of this subsection.

(6) If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges and the accused shall be discharged, unless proper proceedings have been filed under chapter 632 or chapter 475, RSMo, in which case those sections and no others will be applicable. The probate division of the circuit court shall have concurrent jurisdiction over the accused upon the filing of a proper pleading to determine if the accused shall be involuntarily detained under chapter 632, RSMo, or to determine if the accused shall be declared incapacitated under chapter 475, RSMo, and approved for admission by the guardian under section 632.120 or 633.120, RSMo, to a mental health or retardation facility. When such proceedings are filed, the criminal charges shall be dismissed

when the court makes its finding on whether the accused is mentally ill and should be committed or whether he is incapacitated and should have a guardian appointed.

11. The result of any examinations made pursuant to this section shall not be a public record or open to the public.

12. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.